United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

NO. 11,609.

Civil.

SOUTHERN RAILWAY COMPANY, a Corporation,
Appellant,

vs.

CLARENCE A. STEWART, Administrator of the Estate of JOHN R. STEWART, Deceased,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLEE'S PETITION FOR A REHEARING.

Comes now appellee in the above-entitled cause and files this, his petition for a rehearing of said cause, and prays that the Court grant appellee a rehearing of said cause, and as grounds for his said petition states that the Court in its opinion rendered and filed herein on April 15, 1941, has inadvertently overlooked material matters of law and fact, as shown by said opinion, and that said opinion is contrary to many prior decisions of this Court and of the Supreme Court of the United States, as hereinafter appears.

I.

This Honorable Court in its former opinion herein, filed on November 1, 1940 (Southern Railway Company v. Stewart, 115 Fed. [2d] 317), held that the evidence adduced below sufficed to make the case one for the jury. This Court held that there was evidence from which a jury could lawfully find that appellant had breached the duty placed upon it by the automatic coupler requirement (Sec. 2) of the Safety Appliance Act in failing to have its cars equipped with couplers such as the act requires, and that Stewart's death proximately resulted from such breach of duty. In its said former opinion, this Court (115 Fed. [2d], l. c. 321) said:

> "We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor non obstante veredicto should have been sustained; but in view of that record, we cannot say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged."

The Court held, however, in said former opinion, that the trial court erred in its charge to the jury, and because thereof ordered that the judgment be reversed and the cause remanded for a new trial. In its last opinion herein, rendered on April 14, 1941, after a rehearing of the cause, the Court holds that there is no substantial evidence that the deceased came to his death by reason of the failure of appellant to equip its cars with couplers as required by the act, and orders that the judgment be reversed and the cause remanded with directions to grant appellant's motion for judgment in its favor notwithstanding the verdict.

Appellee respectfully submits that in so ruling the Court has inadvertently overlooked and failed to apply ele-

mentary, fundamental rules of law to be observed in passing upon a motion for a directed verdict.

It is the settled rule of decision of the federal courts that, in passing upon a motion for a directed verdict, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fairminded men may honestly draw different inferences or conclusions from the evidence, the question is one of fact for the jury.

These principles have been enunciated and applied in a long list of cases, with which the Court's last decision herein conflicts, among which are the following:

Gunning v. Cooley, 281 U. S. 90;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193;
New York Central R. Co. v. Marcone, 281 U. S. 345;
Lumbra v. United States, 290 U. S. 551, 553;
Walkup v. Bardsley (8th Cir.), 111 Fed. (2d) 789, l. c. 791, 792;
Schwarz v. Fast (8th Cir.), 103 Fed. (2d) 865, l. c. 867;
Jones v. United States (8th Cir.), 112 Fed. (2d) 282, l. c. 287;
Elzig v. Gudwangen (8th Cir.), 91 Fed. (2d) 434;
Falstaff Brewing Corp. v. Thompson (8th Cir.), 101 Fed. (2d) 301, 303;
Asher v. United States (8th Cir.), 63 Fed. (2d) 20, l. c. 23;
Illinois Power & Light Corp. v. Hurley (8th Cir.), 49 Fed. (2d) 681, l. c. 686;
Chicago, St. P. M. & O. Ry. Co. v. Kulp (8th Cir.), 102 Fed. (2d) 352, 356;
Line v. Erie R. Co. (6th Cir.), 62 Fed. (2d) 657, 659;
Worthington v. Elmer (6th Cir.), 207 Fed. 306, 308.

II.

On pages 7 and 8 of the manuscript opinion, the Court first says that it was the **duty** of the deceased to use the pinlifter in opening the knuckle on the car so as to prepare it for impact, and that there is no evidence that he did so; and then, in effect, holds that the testimony of the engineer, Martin, **conclusively** shows that the deceased did not try to use the pinlifter before going between the cars to effect a coupling by hand.

In stating that it was the duty of the deceased to use the pinlifter, the Court has inadvertently overlooked the fact that a recovery may not be denied on the ground of **a breach of duty** on his part. No duty is placed upon an employee by the act. By the express terms of the act an employee cannot be denied a recovery upon the ground of negligence on his part **in failing to use the pinlifter or otherwise.** (45 U. S. C. A., Sec. 53, Act of April 22, 1908, c. 143, Sec. 3, 35 Stat. 66.) Whether a deceased employee killed in endeavoring to effect a coupling tried to use the pinlifter before going between the cars, or whether this may be presumed or inferred, **is of consequence only on the question whether the inoperative coupler, if any, was the proximate cause of the injury.**

In this portion of its last opinion herein the Court has inadvertently overlooked the fact that in order to recover **it was not incumbent upon the plaintiff to adduce any testimony that Stewart undertook to use the pinlifter before going between the cars.** If there was evidence warranting the jury in finding, **if by inference only,** that the pinlifter was inefficient and inoperative (and, for the reasons to be hereafter stated, we submit there was such evidence), then the presumption, prima facie, prevailed that Stewart **did** undertake to use the pinlifter before going between the cars, and a case was made for the jury. Such

presumption is indulged in the absence of evidence to the contrary—such evidence as a jury would be bound to accept as repelling the presumption or putting it to flight. **In the absence of such evidence, the presumption always prevails that a deceased performed whatever duty may have rested upon him under the particular circumstances of the case. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, l. c. 474; Looney v. Metropolitan R. Co., 200 U. S. 480, l. c. 488; Worthington v. Elmer, 207 Fed. 306, 309; New Aetna Portland Cement Co. v. Hatt, 331 Fed. 611, 617.**

The case of **Chesapeake & Ohio Ry. Co. v. Charlton, 247 Fed. 34,** cited by the Court in this connection, **constitutes, we submit, no authority for the proposition that recovery may not be had without proof that the deceased attempted to use the pinlifter before going between the cars. In the Charlton case there was no evidence that the couplers were defective or inoperative.** The only evidence as to their condition was that adduced by the defendant to the effect that a thorough inspection after the casualty showed that all parts thereof were in perfect working condition. There was consequently nothing at all to show a violation of the act by the defendant, **and this was the real ground of the decision; for the Court held that if the coupler had been out of order it would have been the duty of the trial court to have submitted the case to the jury.** (247 Fed., l. c. 36.)

And in holding, in effect, that the testimony of the engineer **conclusively** shows that the deceased did not try to use the pinlifter before going between the cars to effect a coupling by hand, **the Court, we respectfully submit, has plainly violated the rule that in passing upon a demurrer to the evidence or a request for a directed verdict the evidence is to be viewed in the light most favorable to the**

plaintiff, giving the plaintiff the benefit of every inference that may fairly and reasonably be drawn from the evidence; and has also plainly violated the rule that the jurors are the judges of the credibility of the witnesses and the weight to be given to their testimony.

Martin, the engineer, testified:

> "Q. Did you **pay any attention** to whether or not Stewart used the pinlifter before he went in there? A. **I did not notice him.**
>
> Q. **You did not notice?** A. **I did not notice him.**
>
> Q. **As an engineer, what do you look out for all the time?** A. **Look out for signals"** (Tr. 46).

We submit that this testimony, upon its very face, obviously amounts to nothing more than testimony that the witness **did not pay any attention** to whether Stewart did or did not undertake to use the pinlifter before going between the cars. The witness was pointedly asked **if he paid any attention** "to whether or not Stewart used the pinlifter before he went in there," and his answer simply was, **"I did not notice him."** One of the dictionary definitions of the verb "to notice" is to **"pay attention to."** The natural interpretation of Martin's testimony, therefore, **particularly in view of the form of the question propounded to him,** is simply that **he paid no attention to whether Stewart did or did not use the pinlifter.** And this is further strengthened by the fact that he followed this by saying that **what he did all the time was to look out for signals.** There is not a scintilla of evidence that he was under any duty to observe whether or not Stewart used the pinlifter. He did not profess to be under any such duty. On the contrary, his testimony shows that he was concerned only with signals for the operation of his engine.

But if there may be any question as to what Martin meant by this testimony, **surely, we submit, it was for the jury to say what effect and weight was to be given thereto.**

Viewing it in the light most favorable to the plaintiff, as it must be viewed on demurrer to the evidence, it means simply that the witness was telling the jury that he paid no attention to Stewart beyond keeping a lookout for his signals.

Furthermore, the evidence showed that there were seven or eight loaded and coupled freight cars, as well as the tender, between the engine and Stewart when the latter approached the opening between the two cars coupled together (Tr. 29). An average car is 40 feet in length (Tr. 44), and there were openings between the cars. **Viewing the evidence in the light most favorable to plaintiff**, Martin was fully 350 feet away from Stewart at the time. According to Stogner's testimony, it was about dusk (Tr. 27). **And this must be accepted as true.** And when Stewart, after giving Martin the stop signal, went to the opening between the bodies of the two cars that were to be coupled together he naturally faced that opening, faced south, **with his right side turned toward Martin**, who was west of him. **The pinlifter is normally operated by the left hand** (Tr. 33), because of its location at the left of the one facing the opening between cars to be coupled (Tr. 33). With Stewart standing—as he doubtless was, and as the jury could find he was—at the very side of these cars, with his left hand and arm hidden from Martin's view, we are unable to perceive how Martin, fully 350 feet away, with darkness coming on, could have seen, with any degree of certainty, what Stewart did with his left hand. Under such circumstances, if Martin had undertaken to testify positively that Stewart did not attempt to use the pinlifter, the jury would have been fully warranted in rejecting such testimony as constituting no substantial evidence on the subject, and without probative force, because of the witness' lack of opportunity to observe with any degree of certainty what Stewart did in that connection.

"It is elementary that in the trial of an action at law, the jurors are the sole and exclusive judges of the facts, of the credibility of the witnesses, and of the weight of the evidence. **Evidence which is uncontradicted is not necessarily to be accepted as true.** Its weight and the credibility of the witnesses who gave it are usually for the jury to determine." **Elzig v. Gudwangen (8th Cir.), 91 Fed. (2d) 434, l. c. 440.** (Emphasis ours.)

In the case last cited the opinion, by Judge Sanborn, is very exhaustive, citing and quoting from many cases holding that a jury is not bound to accept the testimony of a witness, even though he is not contradicted by any other witness; that jurors have the right to consider all of the facts and circumstances bearing upon the credibility of the witness, his opportunity for observation, his relation to either party to the suit, and the probability or improbability of his statements when taken together with all of the other facts and circumstances in evidence, and then to give such weight, if any, to his testimony as they, in their judgment, deem proper.

We respectfully submit that in this case the jurors were plainly at liberty to regard this testimony of the witness Martin as constituting nothing more than testimony that he paid no attention to whether Stewart did or did not use the pinlifter; and were also plainly at liberty, in any event, to reject any testimony that Martin might give on this subject on the ground that the witness was so far lacking in opportunity for accurate observation under the circumstances as to make such testimony worthless.

This case was tried by the learned District Judge below upon the theory that the jury could, with propriety, consider Martin's testimony set out above as constituting no substantial evidence that Stewart did not attempt to use the pinlifter before going between the cars. This, we

respectfully say, was entirely proper. The trial court, in that connection, followed the course pursued in **Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461.** The Court instructed the jury that **"in the absence of any evidence that he (Stewart) did not use the pinlifter, the law presumes that he did use the pinlifter before going between the ends of the cars."** The Court recognized that, under the evidence adduced, **it was for the jury to say whether there was any evidence**—evidence that the jury would accept as constituting substantial evidence—that Stewart did not use the pinlifter. In the **Landrigan case,** supra (191 U. S. 461), the trial court instructed the jury that **in the absence of evidence to the contrary there was a presumption that the deceased stopped, looked and listened.** This the Supreme Court of the United States held was proper; and that Court very significantly said:

> "The court did not tell the jury that all those who cross railroad tracks stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and **it was left to the jury to say if there was such evidence."** (191 U. S., l. c. 474.)

If there was no evidence that Stewart did not attempt to use the pinlifter, **none that the jury was bound to accept as such** (and we say there was none), then the presumption is that Stewart **did** attempt to use the pinlifter before going between the cars. Certainly, we submit, a recovery may not lawfully be denied on the ground that the plaintiff did not adduce affirmative testimony that the deceased attempted to use the pinlifter before going between the cars.

Courts of very respectable authority have held that, where the action is for the death of an employee in a coupling operation and there is evidence warranting a find-

ing that the coupling apparatus was inefficient or inoperative, it is not essential to a recovery that the plaintiff adduce testimony that the deceased employee attempted to use the pinlifter on such coupling apparatus before going between the cars.

In **Yazoo & M. V. R. Co. v. Cockerham, 134 Miss. 887, 99 So. 14,** the action was for the death of an employee, alleged to have been caused by the violation by defendant carrier of the duty placed upon it by the automatic coupling provisions of the Safety Appliance Act. The Court stated that **"whether or not he (the deceased) tried to operate the coupling apparatus by use of the lever with his hand is not shown."** There was testimony that an examination of the coupler shortly after the casualty showed that there was a nail in it at one place instead of a cotter pin, but defendant's foreman, who gave this testimony, said that the coupler was in first-class condition, as far as operation was concerned. However, tests made the following morning, with a nail at this particular place in the coupler, instead of a cotter pin, showed that special manipulation of the lever might be necessary in order to operate the pinlifter. In holding that the case was one for the jury, the Supreme Court of Mississippi (99 So., l. c. 15, 16) said:

> "In many of the cases there was no defect shown in the coupling appliance save the fact that the injured employee attempted to manipulate the lever which for some reason failed to work. In the case at bar **while the testimony is silent as to any attempt to manipulate the lever,** yet the testimony of the plaintiff is to the effect that the coupling appliances would not at all times work by the usual and customary manipulation of the lever. We think the jury were warranted from this testimony in believing this appliance defective **and that it was not necessary before a recovery may be had to prove that the employee at-**

tempted to use the lift lever on the defective coupling appliance.

"The peremptory instruction for the defendant was properly refused." (Emphasis ours.)

And in the Yazoo case the Supreme Court of the United States denied the defendant's petition for a writ of certiorari. 265 U. S. 586, 68 L. Ed. 1193.

In **Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005**, the deceased, a switching foreman, sustained fatal injuries by being crushed between two cars and died a few minutes later. An examination of the coupling apparatus after the casualty showed that the knuckle in question would not open by use of the pinlifter. A verdict for the plaintiff below was sustained on appeal, **though no witness observed whether Hurley did or did not try to use the pinlifter before going between the cars.**

On pages 7 and 8 of the opinion of April 14, 1941, the Court says:

> "It is argued that deceased was excused from any effort to prepare the coupler for impact by use of the pinlifter because, it is said, there was evidence that the pinlifter did not respond."

We respectfully beg leave to call the Court's attention to the fact that nowhere in brief or oral argument has counsel for appellee ever argued that the deceased was **"excused"** from any effort to prepare the coupler for impact by use of the pinlifter. The Court has inadvertently misconceived the argument of appellee's counsel in this connection. We have contended, and still respectfully contend, that the testimony of the witness Stogner sufficed to warrant a finding that the pinlifting device of this coupler was inefficient and inoperative, in violation of the act; but we have not argued that, because of this, the deceased was "excused" from using the pinlifter before

going between the cars. To so argue would be to impliedly concede that he did not attempt to use the pinlifter. This we have never done. On the contrary we have always contended and still contend that under the circumstances the jury could rightfully presume that he **did** attempt to open the knuckle by means of the pinlifter before going between the cars to open it by hand; and that a jury, proceeding by fair inference, could so find without the necessity of invoking the presumption as such. And the authorities cited above make it clear, we submit, that where there is evidence that the pinlifting device, designed to open the knuckle without the necessity of men going between the cars, is inefficient or inoperative, **it is not necessary to a recovery that any direct proof be adduced that a deceased employee attempted to use the pinlifter before going between the cars.**

III.

And in ruling, in its said last opinion, that the testimony of the witness Stogner is insufficient to support a finding by the jury that this coupling device was inefficient and inoperative and not such as to comply with the act, **this Honorable Court, we submit, has inadvertently overlooked and failed to apply the above mentioned fundamental rules that in passing upon a motion for a directed verdict, it is the duty of the appellate court, as well as of the trial court, to view the evidence in the light most favorable to the plaintiff and to accord the plaintiff the benefit of every inference that may fairly and reasonably be drawn from the evidence, and that if the minds of reasonable men may differ as to what inferences or conclusions should fairly and reasonably be drawn from the evidence, then the case is one for the jury.** Stogner's testimony in this connection, on direct examination, is set out in the opinion as follows:

"Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident? A. I did.

Q. How did you open the knuckle? A. I opened it with my hand.

Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pinlifter, is it necessary to go in between the cars to open with your hands then? A. No, sir" (Tr. 34).

On cross-examination by appellant's counsel, Stogner testified:

"Q. Now, which knuckle did you try to open, or **which pinlifter did you try to use? A. The one on the north side.**

Q. On the north side? A. Yes, sir.

Q. And which was that? A. Well, **that was the east car on the opening"** (Tr. 36).

The Court in its opinion holds that this testimony does not indicate that there was a defect in the coupling device; that it does not prove that the coupler or pinlifter on this particular car did not operate satisfactorily. The Court says that Stogner did not testify that he was unable to open the knuckle by use of the pinlifter, nor what, if any, effort he made so to do. And the Court says:

"What effort he, Stogner, made to open the knuckle by use of the pinlifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make 'an earnest and honest effort to operate the coupler in an ordinary and reasonable manner' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition?'"

(The language quoted by the Court is from the opinion in Chicago etc. R. Co. v. Linehan, 266 Fed. 373, from which the Court quotes earlier in the opinion.) And the Court then continues:

"It does not even appear whether this 'try' to open

the knuckle came after the knuckle was open or before. A very essential element is left to conjecture and speculation."

We most respectfully submit that the Court has inadvertently, but utterly, failed to realize the force and effect required to be given to the testimony of the witness Stogner under the rules to which we have adverted above, applicable where a court is asked to declare that the evidence is insufficient to support a verdict below. **If the evidence, indeed, is to be viewed in the light most favorable to the plaintiff, and if, indeed, the plaintiff is to be given the benefit of every inference that may be fairly and ligitimately drawn from Stogner's testimony, then, according to decisions in cases too numerous to mention, this testimony fully sufficed to warrant the jury in finding that this coupling device was inoperative and inefficient in that the pinlifter could not be operated so as to open the knuckle from the outside of the car, making it necessary to go between the cars to perform that operation.**

It must be borne in mind that Stogner went to these two cars to effect a coupling of them shortly after Stewart had had his arm crushed by reason of going between the cars to open the knuckle by hand. He said he opened the knuckle by hand, and that this is not necessary if the pinlifter is working (Tr. 34). Is it, we ask, reasonable to suppose that Stogner, an experienced brakeman and the foreman of the crew, having freshly in mind the casualty that befell Stewart by reason of going in between these very cars to effect a coupling by hand, would have gone in to encounter the very same danger without first having made an earnest effort to use the pinlifter so as to avoid the necessity of going between the cars? Indeed, we submit that Stogner's testimony **on direct examination alone** sufficed to warrant the inference that he was **required** to go between the cars to open the knuckle by

hand because he was unable to do so by means of the pin-lifting device. Surely no man in his senses, after such a calamity as had so recently befallen Stewart, would have taken the risk of going between the cars and using his hands to open the knuckle unless he had found that the pinlifting device was inoperative so as to make it necessary to open the knuckle by hand. We think that it would be difficult to find twelve laymen, competent to serve upon a jury, who would not so conclude.

But this Honorable Court, in its opinion, not only holds that said testimony of Stogner on direct examination does not indicate that there was a defect in the coupling device, **but further holds that his testimony on cross-examination that he tried to use the pinlifter mentioned, taken with his testimony on direct examination, does not suffice to warrant a finding that the pinlifter was inefficient or inoperative.** Referring to Stogner's testimony on cross-examination, the Court, on page 10 of the manuscript opinion, says:

> "But he does not testify that he was unable to open the knuckle by use of the pinlifter, nor what, if any, effort he made to do so. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pinlifter, or what force he applied, finds no answer in this record, but is left to conjecture. Did he make 'earnest and honest effort to operate the coupler in an ordinary and reasonable manner,' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition'? It does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation."

We deem it quite clear that the only inference that may

reasonably be drawn from Stogner's testimony that he tried to use the pinlifter, taken with his testimony that he went between the cars and opened the knuckle by hand, is that he made every reasonable effort to open the knuckle by means of the pinlifter before going between the cars to open it by hand. **To say that one tried to use the pinlifter, but went between the cars to open the knuckle by hand—the very thing the pinlifter is designed to avoid—is to say that he attempted to operate the pinlifter but was unable to get it to function.** Surely a jury would be fully warranted in inferring from this testimony **that Stogner, in trying to use the pinlifter, applied such force and made such effort to operate it as to convince him, an experienced switchman, that it would not function and that it was necessary for him to do what Stewart did, namely, to go in between the cars and open the knuckle by hand, as he did.**

We judge that it was through the merest inadvertence that the Court made the statement that **"it does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before."** After Stogner had gone in and opened the knuckle by hand, not only was there then no occasion for him to use the pinlifter, but a pull upon the lever, as to open the knuckle, would demonstrate nothing when the knuckle was already open. After the knuckle had been opened by hand, Stogner would have had no possible means of determining whether the pinlifter would open the knuckle, unless, indeed, after having opened it by hand he should again close it and then try to open it by means of the pinlifter. Surely, when Stogner said that he tried to use the pinlifter and also said that he went in and opened the knuckle by hand, no juror could reasonably have supposed that he **first** went in and opened the knuckle by hand **and afterwards tried to see if it could be opened by means of the pinlifter.**

In the Linehan case, 66 Fed. (2d) 373, l. c. 378, from which the Court quotes in its opinion, this Court made some observations, unnecessary to a decision in that case, to the effect that where proof of a defective coupling device rests alone upon the evidence of an unsuccessful attempt to use the pinlifter, to make out a case it should appear that the employee made an earnest and honest effort to open the knuckle by use of the pinlifter. But the Court in the Linehan case did not say that it is necessary to show **by direct and positive testimony** what effort an employee made to use the pinlifter before going between the cars to effect a coupling by hand. Nor, so far as we have been able to find, has any other court so held.

In this connection it may be observed that in **Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317, l. c. 321,** the Court said:

> "And the concession is made that in the Taylor case, 210 U. S. 281, and in C. B. & Q. R. R. Co. v. United States, 220 U. S. 559, this court settled that the failure of a coupler to work at any time sustains a charge of negligence in that respect, **no matter how slight the pull on the coupling lever.**" (Emphasis ours.)

It is now too well settled to admit of any question that the test of the observance of the duty placed upon the carrier by the act is the performance of the appliance; and that proof of the failure of a coupling appliance to function efficiently at any time, so as to enable the coupling to be effected without the necessity of men going between the cars, suffices to sustain a charge that the act was violated. San Antonio Ry. Co. v. Wagner, 241 U. S. 476; Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66; Chicago, M., St. P. & Pac. R. Co. v. Linehan, 66 Fed. (2) 373; Terminal R. Ass'n of St. Louis v. Kimbrel, 105 Fed. (2) 262; Philadelphia & Reading Ry. Co. v. Auchenbach, 16 Fed. (2) 550,

552, certiorari denied 273 U. S. 761; Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798; Detroit T. & I. R. Co. v. Hahn, 47 Fed. (2) 59, certiorari denied 283 U. S. 842; Meek v. The New York, Chicago & St. L. R. Co., 337 Mo. 1188, 88 S. W. (2) 333; Lang New York Central R. Co., 255 U. S. 455.

The Court's last ruling herein is, we submit, in direct conflict with the cases last cited and with many others of like tenor. Stogner's testimony that he **tried** to use the pinlifter **implies, by clear inference,** that he made an earnest and honest effort to open the knuckle by means of the pinlifter before going between the cars—effort such as to satisfy him that the knuckle could not be opened in that manner and that it was necessary for him to go between the cars and effect the coupling by hand; **the very evil against which the automatic coupler provision of the Safety Appliance Act is directed. Terminal R. Ass'n of St. Louis v. Kimbrel, 105 Fed. (2) 262.**

In **Geraghty v. Lehigh Valley R. Co., 70 Fed. (2) 300,** the deceased employee was crushed between two cars and sustained fatal injuries. **No witness observed what Geraghty did when he went between the cars, nor was there any testimony as to why he went between them.** Geraghty signaled the engineer for the movement in question, and stepped between the two cars as they were about to meet. They came together lightly and made the coupling on the impact, but Geraghty was crushed between them because the coupler of one of the cars was in such condition as to allow the end sills to come too close together when the cars were coupled. The Court said:

> "The defendant contends that, even if applicable, the evidence is insufficient to prove a cause of action for violation of the automatic coupler requirement. **There is no direct testimony that Geraghty went between the cars for the purpose of effecting a coupling**

operation. * * * But the inference is most reasonable that such must have been his purpose; and one of the witnesses testified that he stepped between the cars 'as (if) to adjust a coupling.' * * * **There is no direct testimony that the condition of the cars rendered them incapable of coupling automatically on impact. In fact they did couple on the first contact,** but whether they would have done so had Geraghty not stepped between them is not shown. The defendant says it is mere speculation for the jury to find they would not. **The plaintiff argues that from the fact Geraghty thought it necessary to step between them the jury may infer that the couplers were out of alignment or for some other reason required manual adjustment to make the coupling. We think such an inference is permissible. If alignment or other adjustment were necessary it would supply evidence to carry the case to the jury.** Atlantic City R. R. Co. v. Parker, 242 U. S. 56, 59, 37 S. Ct. 69, 61 L. Ed. 150; Hampton v. Des Moines etc. R. Co., 65 F. (2d) 899 (C. C. A. 8)." (Emphasis ours.)

The instant case is a much stronger case than the Geraghty case. When Stogner, an experienced brakeman, said he **tried** to use the pinlifter the inference, we say, follows, as night follows the day, that he made such effort to open the knuckle by means of the pinlifter as to determine that the knuckle could not be opened that way; that he went between the cars to open the knuckle by hand **because he had found that the pinlifter would not function.**

At the trial below appellant's learned counsel recognized the fact that Stogner's testimony **on direct examination** warranted the inference that he tried to effect an opening of the knuckle by use of the pinlifter before going between the cars. This is shown by counsel's question on cross-examination: **"Which pinlifter did you try to use?"** (Tr. 36). Appellant's counsel did not ask Stogner whether he attempted to use a pinlifter, but, assuming he had done

so, asked him which pinlifter he tried to use, and Stogner said he tried to use the pinlifter on the north side; the pinlifter on the car east of the opening. That was the only pinlifter available to the deceased or to Stogner without going around the train or over or under the cars. And we may here observe that it is well settled that "the statute does not contemplate that railroad employees should be required to go around, over or under the cars in order to operate the coupler from the other side on the adjacent car" (2 Roberts, Federal Liabilities of Carriers, Second Edition 1214, Section 625).

And if the minds of reasonable men may differ as to whether Stogner's testimony warrants the inference that the pinlifting device was inoperative, so as to make it necessary to open the knuckle by hand, **then the question whether appellant violated the Act in failing to equip its cars as the Act requires, was one for the jury. And we respectfully say that the course this case has taken in the court below and in this Honorable Court should, we think, suffice to demonstrate beyond peradventure that that matter was at least one as to which the minds of reasonable men may differ. The learned District Judge and twelve jurors, presumably intelligent, reasonable men, concluded that Stogner's testimony sufficed to warrant the inference that this coupling device was out of order and inefficient. And in the first decision rendered herein by this Honorable Court, on November 1, 1940, three members of the Court were obviously of the same opinion, for the Court unanimously held that the question was one for the jury.**

In **Gulf C. & S. F. Ry. Co. v. Ellis (8th Cir.), 54 Fed. 481,** the action was one to recover the value of a mare and a filly run down and killed by the defendant's train. Under the circumstances it was the duty of the defendant's engineer, as the Court held, to keep a lookout for stock upon

the track which, at the place in question, was straight and level for a half a mile or more in either direction. The plaintiff adduced no direct evidence as to what occurred, but there was testimony that the footprints of the filly showed she had run on the track, ahead of the engine, two hundred yards or more before being overtaken and killed. There was no evidence to show that the train could have been stopped in a distance of 200 yards. However, this Court, through a former distinguished Judge thereof, Judge Caldwell, ruled that there was sufficient proof of circumstances to warrant the inference that the defendant's engineer was negligent in failing to avert the injury by slackening the speed of the train, and the Court (54 Fed., l. c. 484, 485) said:

> "But the case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. Railway Co. v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905. And in cases involving the question of negligence, the rule is now settled that **'when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. * * *' The presumption is that jurors are reasonable men and that the trial judge is a reasonable man, and when the judge and jury who tried the cause concur in the view that the evidence establishes negligence, every presumption is in favor of the soundness of that conclusion."** (Emphasis ours.)

And it is not without significance that **appellant, at the trial below, stood mute and offered not one word of testimony as to the condition in which it found this coupling device after the casualty.** It is altogether fair to assume that after the casualty the usual examination or inspection was made of this coupling device by appellant. Certainly appellant had every opportunity to inspect and test it, and

it was its duty so to do. And had it found the same in good operative condition it would undoubtedly have adduced testimony to that effect, as was done in **Terminal R. Assn. v. Kimbrel**, supra, **105 Fed. 262**, and as has been done in many other cases. But appellant declined to offer any testimony on that subject.

It is a trite rule of law, one that was early established in England and that has always had the sanction of our courts, both federal and state, that **the failure of a party to produce evidence of matters peculiarly within his knowledge affords a presumption that such evidence, if produced, would operate unfavorably to him. Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463; Runkle v. Burnham, 153 U. S. 216, 225, 38 L. Ed. 694; Graves v. United States, 150 U. S. 120, 37 L. Ed. 121; Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957; Choctaw & M. R. Co. v. Newton, 140 Fed. 225, l. c. 238; Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 483; Pullman Company v. Cox (Tex. Civ. App.), 120 S. W. 1058, l. c. 1060.**

In **Choctaw & M. R. Co. v. Newton**, supra (**140 Fed. 225, l. c. 238**), this Court said:

> "Where a party has the means of producing testimony within his knowledge or keeping upon a material question involved in the case, and fails to do so, the presumption arises that the fact is against him." (Citing Gulf etc. Ry. Co. v. Ellis, supra, 54 Fed. 481, and decisions of the Supreme Court of the United States which we have cited above.)

In **Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481**, from which we have quoted above, where the plaintiff's case rested wholly upon inferences to be drawn from the facts in evidence, the defendant did not produce its engineer as a witness. This Court said:

"The circumstantial evidence in the case is ren-

dered more cogent, if not conclusive, by a well-settled rule of evidence. The facts in the matter in dispute rested peculiarly within the knowledge of the defendant, and it had in its power to show, by its engineer, what they were, and declined to do so. Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, **the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion.** 'It is certainly a maxim,' said Lord Mansfield, 'that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.' Blatch v. Archer, Cowp. 63, 65. It is said by Mr. Starkie, in his work on Evidence, vol. 1, p. 54:

"'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'" (Emphasis ours.)

The Court has inadvertently overlooked and failed to apply this familiar rule, though no record could well present a situation calling more strongly for the application thereof.

We do not, of course, contend that a case will be made for the jury as for a violation by a defendant carrier of the Safety Appliance Act without any proof warranting an inference that the act was violated, though the defendant comes forward with no evidence. But this is not such a case. From Stogner's testimony that he went between

the cars and opened the knuckle by hand, though it is not necessary to open a knuckle by hand if the pinlifter is working, followed by his testimony that he tried to use the pinlifter, the inference naturally arises that the pinlifter was inefficient and inoperative. In our judgment that evidence needed no strengthening in order to make out a case for the plaintiff; but it is greatly strengthened by the failure of appellant to produce any evidence as to the condition of this coupling device, a matter peculiarly within its knowledge, constituting "a potent circumstance against it" (Pullman Company v. Cox, supra, 120 S. W., l. c. 1060), and operating to leave no room for doubt that the question of appellant's violation of the act was one for the jury.

For the reasons stated above, we earnestly pray that the Court grant appellee a rehearing of this cause.

Respectfully submitted,

CHARLES M. HAY,
CHARLES P. NOELL,
WM. H. ALLEN,
Attorneys for Appellee.

Certificate of Counsel.

Charles M. Hay, Charles P. Noell and Wm. H. Allen, counsel of record for appellee in the above-entitled cause, do hereby certify that the above and foregoing petition of appellee for a rehearing of said cause is filed in good faith and is believed by them to be meritorious.

CHARLES M. HAY,
CHARLES P. NOELL,
WM. H. ALLEN,
Attorneys for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 29, 1941.

[fol. 472] (Order Denying Petition of Appellee for Rehearing.)

May Term, 1941.

Wednesday, May 7, 1941.

The petition for rehearing filed by counsel for the appellee having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

May 7, 1941.

[fol. 473] (Motion of Appellee to Stay Mandate, etc.)

To the Honorable United States Circuit Court of Appeals in and for the Eighth Judicial Circuit, or any Judge thereof;

Comes now the appellee in the above entitled cause and states that appellee desires to apply to the Supreme Court of the United States for a writ of certiorari to review the decision of the Court in said cause, as shown by the Court's opinion rendered herein on April 14, 1941, and moves and prays that an order be made staying and withholding the mandate of this Court in said cause pending appellee's said application for said writ, in accordance with the Rules of this Court in such cases made and provided.

Respectfully submitted,

CHARLES M. HAY,
CHARLES P. NOELL,
WM. H. ALLEN,
Counsel for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 13, 1941.

[fol. 474] (Order Staying Issuance of Mandate.)

May Term, 1941.

Thursday, May 15, 1941.

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of cer-

tiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 15, 1941.

[fo]. 475] (Praecipe for Transcript for Supreme Court on Application for Writ of Certiorari.)

To Hon. E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit, St. Louis, Missouri:

Please incorporate the following into the record to be certified to the Supreme Court of the United States on Appellee's application to that Court for a Writ of Certiorari to this Court in the above entitled cause, namely:

1. The printed transcript of the record.

2. Appearances of Counsel.

3. Record entry showing argument and submission of the cause on March 15, 1940, before Judges Sanborn, Thomas and Van Valkenburgh.

4. Order of July 24, 1940, substituting Clarence A. Stewart as Administrator of the Estate of John R. Stewart, deceased, as appellee.

5. Opinion of the Court by Judge Van Valkenburgh on November 1, 1940.

6. Judgment of the Court on November 1, 1940, in accordance with opinion of that date.

7. Appellant's Petition for a Rehearing filed November 15, 1940.

8. Appellee's Petition for a Rehearing filed November 15, 1940.

[fol. 476] 9. Order of December 7, 1940, granting both of said petitions for rehearing and vacating, setting aside and holding for naught judgment entered November 1, 1940.

10. Record entry showing argument and submission of cause before Judges Gardner, Sanborn and Thomas on March 10, 1941.

11. Opinion of the Court by Judge Gardner rendered on April 14, 1941.

12. Judgment of the Court of April 14, 1941, in accordance with the opinion of that date.

13. Appellee's Petition for Rehearing filed April 29, 1941.

14. Order of May 7, 1941, denying appellee's petition for a rehearing.

15. Motion of Appellee to stay mandate, filed May 13, 1941.

16. Order of May 15, 1941, staying mandate.

Respectfully,

CHARLES M. HAY,
CHARLES P. NOELL,
WM. H. ALLEN,
Counsel for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 23, 1941.

[fol. 477] (Clerk's Certificate.)

United States Circuit Court of Appeals
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk,

and full, true and complete copies of the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellee, in a certain cause in said Circuit Court of Appeals wherein the Southern Railway Company, a Corporation, was Appellant, and Clarence A. Stewart, Administrator of the Estate of John R. Stewart, Deceased, was Appellee, No. 11,609, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 28th day of May, A. D. 1941.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 478] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7560)